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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID SMITH, Defendant and Appellant.	B283278 (Los Angeles County Super. Ct. No. NA098545)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed in part and remanded in part with instructions.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Roberta L. Davis and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Smith and his brother, James Smith, encountered Christopher Lane and his girlfriend, M. Allen, on a Long Beach sidewalk.[1] The foursome exchanged insults and then blows. The altercation turned deadly when defendant shot Lane three times. Defendant also threatened Allen with the gun.

A jury rejected defendant's theories of self-defense and defense of others and convicted him of second degree murder and assault with a firearm. It also found true a firearms enhancement allegation related to the murder, on which the trial court imposed the then-mandatory sentence.

Defendant raises numerous challenges to his convictions and sentence. He argues that the trial court committed prejudicial instructional error by providing inconsistent oral and written instructions and failing to instruct on self-defense in accordance with *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*). He also contends that the court committed prejudicial evidentiary error by admitting a photograph from his cellphone and statements James made to inmate informants, and excluding evidence of Lane's prior firearms convictions. Defendant further contends that the court improperly handled an incident involving a trial spectator taking photographs, that the prosecutor committed misconduct by arguing facts outside the record and violating *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), that his

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[1]We refer to the surviving victim by her first initial and last name to protect her personal privacy interests. (Cal. Rules of Court, rule 8.90(b)(4).) We refer to defendant's brother James by his first name to avoid confusion.

counsel was ineffective for failing to object to the alleged prosecutorial misconduct, and that the cumulative effect of all the alleged errors deprived him of a fair trial. Finally, defendant argues that he should be resentenced in accordance with Penal Code section 12022.53, subdivision (h),[2] a recently enacted provision that vests the trial court with discretion to strike or dismiss firearm enhancements. The Attorney General concedes the last point.

We agree that defendant is entitled to resentencing in light of section 12022.53, subdivision (h) and accordingly remand the matter to the trial court to exercise its discretion in regards to resentencing. We affirm the judgment in all other respects.

PROCEDURAL HISTORY

A joint information charged defendant and James with murdering Lane (§ 187, subd. (a)) and assaulting Allen with a firearm (§ 245, subd. (a)(2)). The information further alleged that both crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). In addition, the information alleged as to the murder count that defendant or a principal personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subds. (d) & (e)), and alleged as to the assault count that defendant or a principal personally used a firearm (§ 12022.5, subd. (a)).

James pled guilty to an interlineated charge of voluntary manslaughter. Defendant proceeded to jury trial on the original information. The jury found him guilty of second degree murder

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[2]All further statutory references are to the Penal Code unless otherwise indicated.

and assault with a firearm. The jury found true the enhancement allegation on the murder, but found untrue the gang allegation and personal use enhancement on the assault.

The trial court sentenced defendant to a total term of 40 years to life: 15 years to life on the murder count, an additional consecutive 25 years to life on the firearm enhancement, and the midterm of three years on the assault count, to run concurrently to the murder sentence. Defendant timely appealed.

FACTUAL BACKGROUND

I. Prosecution Evidence[3]

Allen testified that she and the victim, Lane, were dating in February 2014. On the afternoon of February 21, 2014, she visited him in Long Beach. Lane and Allen decided to walk to Allen's brother's house nearby. Allen, who was 4'11", was wearing a hat that said "Compton", Lane was a member of the Compton gang Tragniew Park. Neither of them was armed.

Allen saw "two boys walking towards us on [the] same block." She did not know them at the time but later identified them as defendant and James in a photographic lineup and in court. Another witness, a detective who was on duty when defendant and James were taken into custody, testified that defendant was about 5'8" and James was about 6'0". Allen said that Lane was shorter than James.

Allen testified that she suggested to Lane that they cross the street because defendant seemed to be holding a weapon at the waist of his basketball shorts. Lane disagreed, and the pairs soon reached one another. A silent video from a surveillance

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[3]Because the jury found the gang allegations not true, we do not discuss the evidence primarily directed at proving or disproving those allegations.

camera across the street showed Allen and Lane walking between defendant and James, who were headed in the opposite direction. Approximately three seconds after the pairs passed one another, they stopped, turned, and began walking toward one another.

Allen testified that defendant or James—she could not remember which—said something to the effect of, "Little Momma, what you doing with him?" She responded that they should not worry about it. Defendant then asked Allen and Lane what they were doing in the neighborhood, and told them, "Ain't no Compton niggers allowed up over here." Allen "took it disrespectful," because she believed she had a right to be anywhere she wanted, and told defendant as much. The video shows Allen gesturing at defendant and James and apparently exchanging words with them.

Both defendant and James said something to the effect of "There's Babies up over here," which Allen understood as a reference to "Insane Babies, another hood name."[4] Allen told defendant and James she did not care about that; neither she nor Lane said anything about Compton or Tragniew Park. Defendant or James invited Allen and Lane to meet them at the corner, which was out of view of the surveillance camera. Allen feared defendant would shoot them, but she and Lane went to the corner anyway. The corner was in the direction they were originally walking; defendant and James changed direction to get to the corner.

At the corner, Allen testified, "It was face to face. We arguing." After James repeatedly called her a bitch, Allen hit

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[4]The prosecution's gang expert, Long Beach Police detective Chris Zamora, testified that "Baby Insane" was a clique within the broader Insane Crips gang.

him. James hit her back. Lane tried to intervene, but he and defendant "started getting into it." Lane hit defendant twice and knocked him to the ground. When defendant got up, Allen noticed that he had drawn a gun. She also heard Lane say, "Babe, a gun," and "Babe, run."

Allen started to run away but tripped and fell. As she was getting up, she heard gunshots. She saw defendant aim the gun and shoot Lane. Lane fell to the ground.

Defendant then approached Allen with the gun. He pointed it toward her upper body and told her, "Bitch, I will kill you." Allen told him to do it, but he and James left instead. Allen later described the gun to detectives as a "deuce deuce revolver." This description was consistent with testimony from a criminalist, who concluded that the two bullets removed from Lane's body were .22 caliber and could have been fired from a revolver.

In an interview that was played for the jury, Allen described the incident thusly: "Chris [Lane] knocked [defendant] down. While [defendant] was on his back, Chris start [*sic*] coming my way and tried to get [James] and me to stop fighting. Basically, he tried to get [James] to stop hitting me. [¶] . . . [¶] And when he come [*sic*] my way, all you hear is pow-pow-pow. Okay. I hear the gunshots, I take off running, and that's how I end up falling." On cross-examination, Allen stated, "I can't tell you from three years ago who started fighting first. I see your client [defendant] get knocked to the ground. I see your client get up and shoot Chris."

A 14-second cell phone video taken by a passerby shortly after the shooting showed Lane lying prone on the curb with his left side facing the camera. Several people, including Allen, were around him. No weapon was visible, and there did not appear to

be anything on the ground near him. A man walking in the street near Lane's body briefly reached down and apparently tapped Lane before continuing on his way. Allen was using a cell phone in the video; she testified that she called the police and Lane's mother.

Forensic pathologist and senior deputy medical examiner Raffi Djabourian, M.D. determined that Lane suffered three gunshot wounds: two to the back and a through-and-through on the cheek. He recovered two bullets from Lane's body—one that passed through the right lung and lodged in the chest cavity, and another that lodged in "the sack [sic] around the heart." Djabourian opined that both of those wounds were fatal.

Long Beach police arrested defendant and James in Los Angeles on March 7, 2014. Asia Otts, defendant's and James's cousin, told police that defendant and James contacted her in late February 2014 "and advised her that they had gotten into some trouble in Long Beach and they needed her help and they needed a place to stay." At trial, Otts denied making a statement to that effect, even after the prosecutor played a recording of her interview for the jury; she claimed that the voice on the recording at that portion of the interview was not hers. On cross-examination, Otts testified that defendant took care of James a lot when they were younger, and that the brothers were "best friends" who had a close relationship.

After his arrest, James was placed in a cell with two men who were paid to pose as inmates as part of a *"Perkins* operation."[5] During his conversation with the operatives, which

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[5]In *Illinois v. Perkins* (1990) 496 U.S. 292, 296-297, the United States Supreme Court held that conversations between incarcerated individuals and undercover agents posing as

was played for the jury over defense objection, James identified himself as "from" Babies and said he had been arrested for "hood shit." He also said that he and defendant were "[l]ow-ball" gang-banging, "[b]ut it was like, we was cool," because Lane was from Compton and "was tripping." When one of the operatives asked James what happened, James said that "some shit . . . happened on Linden." He also said that his brother, who also got "busted," was the only other person there. James said "the other" and "the homie" when asked who pulled the trigger, and said "yeah" when asked if he got rid of the gun, a revolver. One of the operatives asked how many times defendant shot, and James said he did not know, but the bullets hit Lane "[i]n the back or something." Later in the conversation, James agreed with the operative that defendant shot Lane "only three times." James admitted to hitting "the dude" but denied hitting the female who was present with him.

II. Defense Evidence

Defendant testified that in February, 2014, he was 5'7" and weighed 126 pounds. He joined the Baby Insane gang when he was 12 or 13. He never put in any work for the gang, however, and prevented his younger brother James from joining. He discontinued his membership a few years later when his first son was born, and never told police he was a gang member. He was not active in the gang on February 21, 2014 and had no intention of "gang banging" or arguing with anyone that day. He did, however, carry a "deuce deuce revolver" for protection, because he had been "[r]un on" and shot at by members of a Long Beach gang in the past. He had never fired the gun.

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inmates do not implicate the coercion and compulsion concerns underlying *Miranda v. Arizona* (1966) 384 U.S. 436.

On the afternoon of February 21, 2014, defendant and James were walking down the street when "[m]e and Christopher [Lane] bumped shoulders with each other."[6] Lane was "bigger" than defendant, about 5'10" and about 170 pounds. According to defendant, "They was walking. I was making space so they could get through, and somehow we still bumped shoulders. And I turned around and said, You're excused." Lane responded, "For what," and defendant told Lane that Lane had bumped his shoulder.

At that point, defendant testified, Allen "jumped in saying we should have moved." Defendant told her to shut up, which prompted Lane to tell him, "It's my bitch. Don't talk to my bitch." Defendant responded that Lane should "get your bitch, then." Lane then said, "What, you want to get down?" Defendant took that to mean Lane wanted to fight. Lane then suggested they move to the corner, and defendant and James acquiesced. Defendant denied that he or James proposed moving to the corner. He also denied that he or James mentioned Insanes or Babies, or asked where Lane and Allen were from.

Defendant believed that "[m]e and Christopher was going to fight," while Allen and James watched. When they got to the corner, however, Allen "approached my brother. I don't remember what she was saying, but she was very aggressive, and I know she took a punch. And her and my brother was fighting." Defendant later clarified that Allen struck James first, and that James responded by "trying to hold her back" and "prevent her from hitting him." Defendant testified Lane "joined in," "[b]asically jumping my brother." Defendant then "stepped over"

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[6]Defendant explained that he did not know Lane or Allen at the time, but had learned their names during the case.

and told Lane to "grab his girl." Lane turned around and punched defendant twice, in the face.

Defendant fell and hit his head on the sidewalk. From that vantage point, he saw Lane turn toward James and say, "I'm going to kill this nigger." Defendant understood that to mean that Lane was about to hurt or kill James. Defendant then saw Lane reach into his pocket with his left hand and withdraw a black gun. Lane held the gun in his left hand and moved toward James, who was about two or three feet away from him.

Defendant, who was on the ground about six to eight feet away from the fray, got up, took his gun out, pointed it at "them," and fired four times. He explained, "I was trying to protect my brother. I was stopping. . . what, I believe, Chris was going to hurt." Defendant described his action as "like a big impulse."

After defendant fired the gun, he was "in a state of shock." He testified that James "brought me back to my senses" by tapping him on the shoulder, and that he immediately "took off running." He denied threatening Allen with the gun before leaving the scene.

Defendant "got rid" of the gun and told his family that he needed to get away from the area because "something happened." He did not turn himself in because he did not want to go to jail.

Defendant's mother, Stephanie Hubbard, testified that he was a member of the Babies gang and James was not. She further testified that she did not raise her children to fight, and that defendant was peaceful around her and the family.

III. Rebuttal Evidence

Three Long Beach police officers, Udom Sawai, Ricardo Solorio, and Hector Gutierrez, testified that defendant admitted to them in 2009 and 2010 that he was a member of the Insane

Crips.

Lane's father and fiancée both testified that he was right-handed. Lane's father also testified that Lane was about 5'7" or 5'8" and weighed around 160 to 165 pounds.

DISCUSSION

I. Jury Instructions

A. Discrepancy between oral and written instructions

The trial court delivered 16 CALJIC jury instructions pertaining to self-defense and defense of others. One of those instructions was CALJIC No. 5.54, "Self-Defense by an Aggressor." The written version of the instruction stated: "The right of self-defense *is only available* to a person who initiated an assault, if [¶] 1. He has done all the following: [¶] A. He has actually tried, in good faith, to refuse to continue fighting; [¶] B. He has by words or conduct caused his opponent to be aware, as a reasonable person, that he wants to stop fighting; and [¶] C. He has by words or conduct caused his opponent to be aware, as a reasonable person, that he has stopped fighting. [¶] After he has done these three things, he has the right to self-defense if his opponent continues to fight."[7] (Emphasis added.) When the court delivered the instruction orally, it misstated the opening portion, informing the jury, "The right of self-defense *is not available* to a person who initiated an assault if, 1, he has done

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[7]CALJIC No. 5.54 has an optional second paragraph that provides, "[if] [T][h]he victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense." Defendant did not request that paragraph below and does not contend here that it should have been given.

all the following: A, he has actually tried in good faith to refuse to continue fighting; B, he has by words or conduct caused his opponent to be aware, as a reasonable person, that he wants to stop fighting; and C, he has caused by words or conduct, to be aware, as a reasonable person, that he has stopped fighting. [¶] After he has done these three things, he has the right to self-defense if his opponent continues to fight."[8]

Defendant concedes that the written instruction "was a correct statement of CALJIC No. 5.54," but argues that "nothing in the record demonstrated that the jury relied upon the written, rather than the oral instruction." He contends that the "hopelessly conflicting instructions on the right of an aggressor to act in self-defense prevented appellant from presenting his theory of defense—one which the prosecution had the burden of proving beyond a reasonable doubt." He further contends that the discrepancy between the oral and written instructions requires reversal, because "the jury must be presumed to have followed the conflicting instructions under CALJIC No. 5.54, which canceled each other out and precluded the jury from finding that an aggressor could have acted in self-defense." We review these claims of error de novo (*People v. Posey* (2004) 32 Cal.4th 193, 218) and reject them.

Our Supreme Court has explained: "The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact that the trial court misspoke. 'We

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[8]Defendant asserts that the trial court also misstated the last sentence of the instruction, by saying "After he had done all of these three things" rather than "After he has done these three things." The trial transcript does not support this assertion.

of course presume "that jurors understand and follow the court's instructions." [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.' [Citation.] Because the jury was given the correctly worded instructions in written form and instructed with CALJIC No. 17.45 that '[y]ou are to be governed only by the instruction in its final wording,' and because on appeal we give precedence to the written instructions, we find no reversible error." (*People v. Mills* (2010) 48 Cal.4th 158, 200-201 (footnote omitted).)

People v. Mills controls here. Defendant does not contend that CALJIC No. 5.54 is an incorrect statement of the law and does not dispute that the court provided an accurate copy of that instruction to the jury. The court also instructed the jury with CALJIC No. 17.45, telling the jurors to rely on the "final wording" of the instructions. That final wording was, of course, the written one. We presume the jury followed the court's directive and applied CALJIC No. 5.54 as given in writing. (See *People v. Wilson* (2008) 44 Cal.4th 758, 803.) We see no basis for departing from the general rule that "as long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally." (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

We are not persuaded otherwise by *People v. Anderson* (1872) 44 Cal. 65, to which defendant points. In that case, the trial court delivered two separate instructions that conflicted with one another. (See *People v. Anderson*, *supra*, 44 Cal. at p. 69.) Here, the trial court gave two versions of a single instruction, an incorrect oral one and a correct written one; thus,

People v. Anderson is not on point. Nor is defendant's suggestion that counsel was precluded from effectively arguing his theories of self-defense and defense of others due to an absence of jury instructions. There was not an absence of instructions here. The court provided the jury with 95 pages of instructions, including 16 instructions on self-defense and defense of others. Counsel had the opportunity to refer to the written instructions during closing argument, and indeed highlighted two relevant instructions, CALJIC Nos. 5.13 and 5.32.

We also reject defendant's argument that counsel's failure to address CALJIC No. 5.54 in closing, as well as the jury's failure to seek clarification on the discrepancy between the oral and written instructions, deprives this court of a "basis from which to conclude that the error was cured." Our basis for concluding that no reversible error occurred is the rule that the written instructions control. Therefore no further curing was needed.

B. Omission of second paragraph of CALJIC No. 5.55

Over defense objection, the trial court instructed the jury with CALJIC No. 5.55, "Plea of Self-Defense may not be Contrived." The court instructed, "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." Defendant did not request, and the trial court did not provide, the bracketed second paragraph of CALJIC No. 5.55, which states, "However, a person who contrives to start a fistfight or provoke a nondeadly quarrel does not forfeit the right to self-defense if [his] [her] opponent[s] respond[s] in a sudden and deadly counterassault, that is, force that is excessive under the

circumstance. The party victimized by the excessive force need not withdraw and may use reasonably necessary force in lawful self-defense."

Defendant now contends the trial court "categorically eliminated the right to self-defense, violating appellant's federal constitutional rights to due process, jury trial, and to present a defense" by failing to give the second portion of CALJIC No. 5.55. He argues that the instruction was inaccurate and incomplete without the second portion, because the jury could have found that he was the initial aggressor, intended only a fistfight, and responded with reasonable force when Lane escalated the fight by drawing a gun. Defendant rests these contentions primarily on *Ramirez*, *supra*, 233 Cal.App.4th 940.

The defendants in *Ramirez* were two brothers and gang members who recruited a fellow gang member to join them in confronting and fighting a rival gang who had been harassing them. (*Ramirez*, *supra*, 233 Cal.App.4th at p. 944.) Though one of the brothers brought a gun with him, he testified that he did not intend to shoot any of the rivals. (*Ibid.*) The friend who went with the brothers also testified the trio was "'just gonna go over there and just confront them and, if anything, we were just gonna fight.'" (*Ibid.*) When defendants arrived at the rival gang's apartment complex, they encountered several gang members and a fistfight "broke out 'instaneous[ly]'"; there was conflicting testimony as to whether defendants or their rivals threw the first punch. (*Ibid.*) Defendants were "double-teamed" by rivals. Then, one of the rivals drew what one of the defendants believed to be a gun. That defendant pulled his own gun from his sweatshirt and shot the rival, killing him. (*Id.* at p. 945.)

At their trial for murder, defendants argued self-defense. The trial court instructed the jury with CALCRIM No. 3472, which is "materially the same" as the first paragraph of CALJIC No. 5.55.[9] (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333 (*Eulian*).) During closing argument, the prosecutor repeatedly highlighted CALCRIM No. 3472 and argued that it prevented defendants from relying on self-defense if they "created the circumstances to begin with," regardless whether the rivals had a gun or used deadly force. (*Ramirez*, *supra*, 233 Cal.App.4th at p. 946.) The jury found defendants guilty, but a divided court of appeal reversed on the ground that CALCRIM No. 3472 was inaccurate in light of the unique facts of the case.

The majority acknowledged that CALCRIM No. 3472 "states a correct rule of law in appropriate circumstances," namely, where an initial aggressor attempts to claim self-defense "against the victim's lawful resistance," or where he or she "contrives a 'deadly' assault" from the outset. (*Ramirez*, *supra*, 233 Cal.App.4th at p. 950.) But "under the facts before the jury," CALCRIM No. 3472 "did not accurately state governing law. The blanket rule articulated in CALCRIM No. 3472 and reiterated by the prosecutor effectively told the jury, 'A person does not have [*any*] right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use [*any*] force.' In effect, the prosecutor and the trial court advised the jury that one who provokes a fistfight forfeits the right of self-defense if the adversary resorts to deadly force." (*Ramirez*, *supra*, 233

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[9]CALCRIM No. 3472, entitled "Right to Self-Defense: May Not Be Contrived," provides: "A person does not have the right to self-defense if he or she provokes a quarrel with the intent to create an excuse to use force."

Cal.App.4th at p. 947.) Instead, the correct rule is that a defendant may claim imperfect self-defense if the original victim escalates a quarrel by introducing deadly force. (*Id.* at p. 950.) Thus, where the record is such that a jury could conclude that the defendant was an initial aggressor who only intended a fistfight but was unexpectedly confronted with deadly force, CALCRIM No. 3472—and its counterpart, the first portion of CALJIC No. 5.55—is incorrect.

Defendant argues, without citation to the record, that this case is analogous to *Ramirez*, such that CALJIC No. 5.55 was incorrect as given: "In appellant's case, there was substantial evidence from which a reasonable jury could have found that either the defendants or Lane and Allen were the initial aggressors; and that appellant and James Smith intended to initiate a non-deadly assault by 'hitting up' Lane and Allen, whom they believed were rival Compton gang members. . . . [¶] Assuming that the jury found appellant's [*sic*] were the initial aggressors [*sic*], there was also substantial evidence that Lane responded to a simple assault with a sudden and deadly counterassault. Therefore, appellant was entitled to use reasonable force to defend himself and his brother." We disagree.

According to defendant, Lane and Allen "set in motion the chain of events" (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1180) that led to guns being drawn: Lane bumped his shoulder, and invited defendant and James to the corner, and Allen punched James. The jury could have accepted this version. Or, it could have believed Allen's version, that defendant began the chain of events by insulting her and Lane. But under neither scenario was the jury presented with evidence that defendant acted with the intent to start nothing more than a fistfight. Allen

testified that defendant conspicuously carried his gun in the waistband of his shorts, and that she believed he suggested going to the corner so he could shoot her and Lane there. Additionally, he entered the fray only after Allen and James began fighting, suggesting that he did not intend to provoke a fistfight. This is not the "rare case in which a defendant intended to provoke only a non-deadly confrontation and the victim responds with deadly force." (*Eulian*, *supra*, 247 Cal.App.4th at p. 1334.)

The instant case is further distinguishable from *Ramirez* in that the prosecutor did not repeatedly misstate the law of self-defense or mislead the jury by arguing, based on the language of the applicable jury instruction, that even if the jury believed defendant sought to provoke only a fistfight, his intent to use force forfeited any claim of self-defense. (*Ramirez*, *supra*, 233 Cal.App.4th at pp. 943, 945-946.) The *Ramirez* prosecutor repeatedly emphasized that it did not matter whether the victim "escalated a nondeadly conflict to deadly proportions." (*Id.* at p. 950.) Here, the prosecutor mentioned only once that "[g]ang-banging and causing a confrontation doesn't give you the right to kill someone. . . . [¶] [I]f somebody is starting a fight, with the intent to use self-defense as an excuse, they are not allowed to do that." Rather than repeatedly telling the jury that self-defense was not available under any circumstance if the jury found that defendant started the fight, she argued that defendant was "creating an opportunity to use the gun he knows he is carrying. This is a gangster trying to use gang banging as an excuse for murder. And that's not allowed." In other words, she argued the exact scenario described by CALJIC No. 5.55 as given.

II. Evidentiary Issues

A. Admission of Cell Phone Gun Photo

Prior to trial, the prosecutor expressed an intent to introduce several photographs retrieved from a cell phone defendant had in his possession when he was arrested. One of those photos showed a hand holding a semi-automatic gun over a denim-clad lap and reusable grocery bag. Defendant objected to the photo as irrelevant and speculative. The court agreed that the photo "is too speculative without more. Basically, we don't even know if this photo is David Smith's or whether or not he had access more than that particular day. We don't know when the photo of the gun that was depicted was taken, who is holding the gun." The court said it would be willing to revisit the issue if the prosecutor came forward with evidence linking defendant to the phone or the gun.

At a subsequent 402 hearing at which the prosecutor raised the matter, the court ruled, "I am not going to allow the three photos that depict the guns because it is too speculative, and under 352 grounds, People cannot proffer that the cell phone, in fact, was registered to defendant. People cannot proffer . . . that defendant is, in fact, the person that is holding the gun. [¶] On the other hand, if the court is to allow that particular photo to come in, it would clearly show that and more likely than not jurors will be influenced by the fact that there is a person with a gun, and, therefore, it must be defendant, so more than likely he is the one that was involved with the shooting. [¶] Another issue is, . . . there are two separate witnesses who indicate that the weapon that was used in this instance was a revolver, not a semiautomatic handgun that was depicted in the photo. So, therefore, I don't believe that probative value is outweighed by

prejudice. Therefore, I am going to exclude it." The prosecutor abided by the court's exclusion order.

During the defense case, defendant's mother, Hubbard, testified that she had never seen him act violent or carry a gun. At sidebar during cross-examination, the prosecutor told the court she wanted to impeach this testimony with the gun photo, which was taken from a phone that Hubbard owned. The court stated that its previous ruling had not accounted for Hubbard's ownership of the phone, and told the prosecutor she could ask Hubbard if she owned the phone. If Hubbard answered yes, the court said, the prosecutor could then ask her about the photos. Defense counsel again objected to the photo of the gun and asked what the purpose was. The court said, "The purpose is, she says she's never seen your client with the gun." After establishing that Hubbard owned the phone, the prosecutor asked her about the photo and showed the photo to Hubbard and the jury. Hubbard, who previously said she was not familiar with all the photos on her phone, which was used by multiple people, denied that the gun photo had come from her phone. The prosecutor did not ask Hubbard any further questions about the gun photo, and defense counsel did not revisit the topic on redirect examination.

The photo came up again during cross-examination of defendant, after he admitted that he used the phone often and took pictures with it, and agreed that "a lot" of his photos were on the phone. At sidebar, defense counsel argued that the photo was highly prejudicial and minimally probative. The court reiterated that those objections had been overruled. The prosecutor then asked defendant about the photo; he denied ever seeing it and further testified, "I don't even know who has that gun. It could be a download from Google. I don't know." Defendant admitted that

he had used the phone to take selfies, and agreed with the prosecutor that the gun photo looked as though it had been taken by the person holding the gun, but denied that he took the photo. He further denied that the gun belonged to any of the other people who had access to the phone.

The issue of the photo arose a final time near the close of the defense case, when the prosecutor said she wanted to introduce evidence showing that the gun in the photo was a .22-caliber. She explained that she wanted to show that defendant had access to the .22-caliber ammunition used to kill Lane. The court disallowed that evidence, ruling, "Well, it may be relevant, but there's minimum linkage. I'm not going to allow it." Neither side mentioned the gun photo in closing argument.

Defendant now contends that the gun photo should have been excluded as irrelevant, or as cumulative, speculative, or unduly prejudicial under Evidence Code section 352. Quoting *People v. Henderson* (1976) 58 Cal.App.3d 349, 360, he further argues that the gun photo "leads logically only to an inference that the defendant is the kind of person who surrounds himself with weapons—a fact of no relevant consequence to determination of the guilt or innocence of the defendant." He also asserts that "[t]he use of irrelevant evidence used to paint the defendant as a person with a commando lifestyle and a fascination for weapons violated due process."

"A trial court has 'considerable discretion' in determining the relevance of evidence. [Citation.] Similarly, the court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects. [Citation.] An appellate court reviews a court's rulings

regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown "'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]'" (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

We find no abuse of the court's wide discretion here. Relevant evidence is evidence, "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) It was not an abuse of discretion for the court to conclude that the gun photo was relevant to the credibility of Hubbard's testimony. Defendant's case law emphasizing the lack of relevance to his culpability is inapposite. The photo was not admitted to show that he committed the crime, surrounded himself with weapons, or otherwise had bad character; it was admitted to sow doubt as to the credibility of his witnesses. The court likewise did not abuse its discretion by concluding that the photo, the sole one of its kind, was admissible under Evidence Code section 352. The court required the prosecutor to link the phone to Hubbard and defendant before it permitted her to ask them about it, mitigating concerns about speculation. The court also mitigated any risk that the photo would be cumulative by excluding other gun photos, and acknowledged the limited probative value by disallowing the prosecutor's questioning about ammunition. The risk of undue prejudice was minimal, because defendant admitted carrying and using a gun.

B. Admission of James's *Perkins* Statements

Prior to trial, defendant objected to James's statements to the *Perkins* operatives on numerous grounds. As relevant here, after James asserted his Fifth Amendment rights and the court found him unavailable, defendant argued that the Evidence Code section 1230 (section 1230) hearsay exception did not apply because the statements were not against penal interest and were not reliable or trustworthy. The court immediately overruled all of the objections except those pertaining to section 1230, which it took under advisement pending its review of the *Perkins* transcript.

Later, after the court reviewed the transcript and heard additional argument from both sides, it overruled defendant's section 1230 objections and ruled that all of the *Perkins* statements were admissible. The court explained that it "look[ed] at the totality of the circumstances" and concluded that James's statements to the *Perkins* operatives implicated "himself of actually assaulting the named victim," and "as potentially an aider/abettor to [the] shooting of the deceased by David Smith." The court continued, "clearly, there are a number of statements that are attributable to James Smith that no objectionable [*sic*] reasonable person would make because it is clearly against his interest. He places himself . . .[at] the location where the crime took place. He basically places himself and states where the parties were, what they were doing at the time of the shooting, and then he also explains how the shooting took place, and what happened after the shooting." The court acknowledged that some of the statements were "not, in fact, statement[s] against penal interest," but ruled "you need the entire transcript to come in to show exactly what was the context in which speaker one, speaker

two [the *Perkins* operatives] spoke to James Smith, and how did James Smith end up giving up a lot of incriminating statements." The prosecutor played the entire recording, which was over an hour long, for the jury during trial.

Defendant now reiterates his arguments that the statements were not admissible under section 1230. He argues that the "vast majority of the hearsay statements offered by the prosecution were not specifically disserving of James Smith's own penal interest," because they "failed to subject him to criminal liability for the shooting itself" and "deflected criminal liability for the shooting onto his brother." He further contends that the statements were insufficiently trustworthy, because they "were not made in a reliable setting, but were made under circumstances wherein he had an incentive to deflect blame onto another person" and were prompted by the *Perkins* operatives.[10]

Section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." The rationale underlying this exception to the rule that hearsay statements are not admissible (Evid. Code, § 1200,

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[10]The Attorney General contends the latter argument is forfeited because defendant failed to develop it below. We disagree.

subd. (b)) is that a person's interest against being criminally implicated heightens the veracity of statements made against that interest, "thereby mitigating the dangers usually associated with the admission of out-of-court statements." (*People v. Grimes* (2016) 1 Cal.5th 698, 711.)

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.] 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not the just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Grimes*, *supra*, 1 Cal.5th at p. 711.)

The court is not required to "sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.'" (*People v. Grimes*, *supra*, 1 Cal.5th at p. 716.) In short, "context matters in determining whether a statement or portion thereof is admissible under the against-interest exception." (*Id.* at p. 717.)

We review a trial court's decision to admit a statement under section 1230 for abuse of discretion. (*People v. Grimes*, *supra*, 1 Cal.5th at p. 711.) The trial court did not abuse its discretion here. Although the statements did not implicate James as the shooter, they exposed him to possible aider and abettor liability. They indicated he was present and participated in the altercation, and revealed incriminating information such as where the crime took place, who fired the gun, how many times, and what happened to the gun and other evidence afterward. "[T]he fact a hearsay statement portrays the declarant as a more minimal participant in a crime by itself does not require exclusion . . . . Only when there is both blame shifting by the declarant and *other* circumstances suggest some improper motive for the blame shifting have courts found admission of a hearsay statement error." (*People v. Smith* (2017) 12 Cal.App.5th 766, 792.)

Defendant argues that such "other circumstances" were present here, because James made the statements "while he was in custody, after he was arrested for the murder, and after detectives had staged a DNA test in the jail cell and had shown him photographs taken on a surveillance video at the liquor store located near the scene of the shooting." He further asserts that the statements were not reliable because James was "too embarrassed" to lose face in front of the older, savvier *Perkins* operatives. The trial court reviewed the entirety of the *Perkins* recording and concluded that those circumstances did not undermine the reliability of the incriminating statements James made. This was not an abuse of its discretion; the statements were informal ones made in the course of a conversation with people James believed to be other detainees.

Defendant also emphasizes that many of the statements were made in response to queries the *Perkins* operatives initiated. For instance, they asked, "The clothes that you were wearing, what did you do with the clothes. You burn them and all that?" and James responded, "Uh-huh." They also asked him how many punches he threw ("like two or three"), and where he threw them ("His face"). James's responses to the queries do not suggest that he was boasting, deflecting blame, or telling the operatives what he believed they wanted to hear. The back-and-forth nature of the conversation supported the conclusion that the statements were sufficiently reliable to be admitted.

C. Exclusion of Lane's Convictions

Prior to trial, the prosecutor filed a motion to exclude evidence that Lane was convicted of illegal firearm possession in 2010 and 2013. In her papers and at the hearing, the prosecutor argued that this evidence was barred by Evidence Code sections 352 and 1101, subdivision (a). Defendant argued that the evidence was relevant and admissible under Evidence Code section 1103. The trial court granted the prosecutor's motion on relevance grounds, ruling, "The fact that Christopher Lane may have had prior convictions involving gun [*sic*] is irrelevant because obviously he is not testifying, can't be used for impeachment purposes, and it is not relevant because there is no issue of your client knowing this particular person or having knowledge of that particular person's prior convictions. So it doesn't even go to the issue of imperfect or perfect self-defense. [¶] So, without more, I am going to rule that it is not relevant." The court reiterated this ruling when defendant raised the issue again during trial. Defendant now contends the court's ruling was erroneous and requires reversal because it "went to the heart

of the defense."

As a general rule, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Defendant contends that Evidence Code section 1103, subdivision (a)(1) provides an exception to that rule that should have applied here. That provision states that evidence of specific instances of conduct of a crime victim are not made inadmissible under Evidence Code section 1101 if they are "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Defendant is correct on this legal point. "'It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.'" (*People v. Wright* (1985) 39 Cal.3d 576, 587.)

However, as defendant also recognizes, "the trial court may exclude otherwise admissible evidence pursuant to Evidence Code section 352 if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative. [Citation.] The trial court must always perform its gate keeping function pursuant to Evidence Code section 350 to exclude evidence that is irrelevant." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828.)

Here, the trial court excluded the evidence of Lane's convictions for firearm possession pursuant to its gate-keeping function. It found the evidence was not relevant to explain defendant's behavior because he did not know Lane and therefore could not have known about his previous convictions. Defendant

argues that the convictions were relevant despite his lack of knowledge of them because they tended to support his testimony that Lane drew the gun during the altercation. We cannot conclude the trial court abused its discretion in finding otherwise. As the Attorney General points out, the convictions "did not involve Lane *using* a gun and thus did not help establish he attempted to use a gun against James, which was what [defendant] would have wanted the jury to infer from the evidence."

III. Spectator Use of Cell Phone Camera

During a break in Allen's testimony, the prosecutor informed the court that Allen "saw somebody taking photographs of her, what she believes was a photograph of her from the audience. . . . Detectives went and spoke to him, went through his phone. They didn't seen any pictures of her, but that doesn't mean it wasn't on Snap Chat [*sic*] or some similar." The court told the prosecutor it would admonish spectators not to take photos and would have staff "try to keep an eye on it."

The following day, before Allen resumed the stand, the prosecutor told the court that the detectives who searched the spectator's phone during what she described as a consensual search found "photos of himself, that person who took the photograph, throwing up Insane and holding a gun." The prosecutor told the court she wanted to present evidence of the incident, both through Allen and the detective who searched the spectator. Defendant argued that such evidence would be irrelevant and "far away from the issues of the case." The court disagreed with his assessment, stating, "If she believes that somebody is taking photos of her, and I mean, clearly that goes to [the] issue of how she would testify in this case. So, it is relevant.

How it is not relevant?" The court also rejected defendant's contention that such evidence would be speculative, observing again that it "[g]oes to her state of mind, how she may testify." The court ruled that it would allow Allen to testify "what she believed she saw because it goes directly to the issue of credibility of her testimony, how it affects her testimony in light of what she testified earlier." The court reserved ruling on the admissibility of the gang-related photos recovered from the spectator's phone, so it could consider whether it mattered that there was no evidence linking the spectator to defendant.

The prosecutor also told the court that the bailiff had reviewed the courtroom video from the previous day and "she did see the flash coming from the camera as well." Defendant objected that he had not seen the video and argued that he was entitled to discovery on it. The court agreed and ruled that a discovery motion would be necessary if the prosecutor wanted to call the bailiff.

During re-direct examination, Allen testified that she had seen "a taller brown-skinned guy with curly hair and a gray sweater" in the audience "taking [a] picture of me up here." She testified that his phone was "facing towards up here with a flash going off." She recalled that she told the judge she had to go the restroom because she was scared that the spectator would come after her "for coming up here." On re-cross examination, defense counsel asked Allen if she knew if someone actually took a photo of her. She said, "Well, I know his phone was facing me. I seen a big old flash go off. And I told the judge I had to go to the restroom." Allen admitted that she did not tell the judge about her concerns, but rather relayed them to Detective Irving.

Later, at sidebar, the prosecutor indicated that she wanted to call Detective Irving as a witness because he had contact with the spectator. She argued the spectator's identity was important, because he was "a member of the same gang as the defendant," such that he "would be in a position to intimidate Ms. Allen or to threaten her or go after her in some way." Defendant again contested the relevance of such evidence and further argued that he needed more discovery and that the evidence was "352 at this point because the people already got into that, that potentially happened." He emphasized that there had been no link established between him and the spectator. The court overruled those objections, concluding it would be "very relevant" if the spectator were a Baby Insane Crips member. The court acknowledged that would "absolutely" be prejudicial, but not so much so that its exclusion was warranted. The court pointed defendant to CALJIC No. 2.05 and invited him to modify the instruction for delivery in the case. The court then asked how the prosecutor planned to show that the spectator was a Baby Insane Crip. She explained that she planned to introduce a photo recovered from the spectator's phone that depicted him throwing a gang sign and holding a gun in his waistband. The court said it would allow that evidence over defense objection.

The prosecutor called Long Beach Police Detective Sean Irving, who testified that Allen told him she was concerned that a spectator had taken a photo of her. He further testified that he viewed video from the courtroom, which the court admitted over defense objection. The video showed a camera flash coming from a spectator's cell phone. Irving further testified that he spoke to the spectator, whose name was Darryl Williams, and searched the cell phone. Irving did not find any photos of Allen on the

phone, but found a photo of Williams throwing a gang sign and holding a gun. Irving testified that he remembered seeing Williams in other photographs related to the case, and the prosecutor introduced a different photo of Williams with James, defendant, and another unidentified person.

Defendant moved for a mistrial at the conclusion of Irving's testimony. He argued that the jury "looked upset and troubled" when the video was played, and expressed concern that they would "make a decision based on fear." The court denied the motion for mistrial. During his own testimony, defendant admitted to talking to Williams but denied having "anything to do with [Williams] being in court, sitting in the back, taking his cell phone out."

At the conclusion of trial, the court instructed the jury with a modified version of CALCRIM No. 2.05: "If you find that an effort to intimidate a witness was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt. There has been no evidence presented that the defendant authorized the effort. This conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."[11]

Defendant argues that the court erred by admitting the above evidence. He contends the evidence should have been

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[11]The original version of CALJIC No. 2.05 provides, "If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

excluded under Evidence Code section 352 because it was speculative, cumulative of other evidence of gang membership, and unduly prejudicial. In particular, he asserts that the jury was required to speculate whether a photo was taken and was likely to conclude that he and Williams were fellow gang members who were attempting to intimidate Allen. We are not persuaded that the court abused its discretion.

"'Evidence that a witness is afraid to testify or fears retaliation is relevant to the credibility of that witness and therefore is admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court.' [Citation.] 'Moreover, evidence of a "third party" threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant. [Citations.]' [Citation.] 'It is not necessarily the source of the threat—but its existence—that is relevant to the witness's credibility.' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 429-430.) Given defendant's trial strategy of attacking Allen's credibility, the probative value of evidence showing she was intimidated was high in this case. The court did not err in concluding that value outweighed the risk of prejudice to defendant. The jury had already heard evidence that he was a gang member and that gang members often retaliate against snitches. Moreover, any prejudice was mitigated by defendant's testimony denying involvement with the photos and the limiting instruction the court gave the jury.

Defendant also contends that the court erred in denying his motion for mistrial. He argues that admission of evidence of Williams's conduct "created an unacceptable risk that [the] jury's determination was influenced by improper factors," and further

contends the evidence linking him to Williams "was manifestly insufficient to allow the prosecution to parade before the jury evidence of Williams' gang membership." We review the denial of a motion for mistrial for abuse of discretion (*People v. Cunningham* (2001) 25 Cal.4th 926, 984), and conclude the court was well within its discretion here.

"Whether an incident is prejudicial and requires a mistrial is 'by its nature a speculative matter.'" (*People v. Williams* (2016) 1 Cal.5th 1166, 1185.) A court should grant a mistrial if it concludes the defendant suffered incurable prejudice such that his or her chances of receiving a fair trial have been irreparably damaged. (*Ibid.*) "Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) Here, the court balanced defendant's concerns about prejudice from the highly probative evidence by instructing the jury that it was not permitted to consider that evidence as indicative of defendant's consciousness of guilt. It further modified the jury instruction to underscore the lack of connection between defendant and Williams's conduct. These efforts were sufficient to allay the potential prejudice defendant feared. The two Ninth Circuit cases defendant cites, *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, and *Mach v. Steward* (9th Cir. 1997) 137 F.3d 630, are inapposite.

IV. Prosecutorial Misconduct

Defendant argues that the prosecutor "engaged in a pattern of misconduct during cross-examination and in closing argument" that deprived him of a fair trial. He contends the prosecutor

repeatedly committed *Doyle*[12] error during cross-examination and closing argument, misstated the law of self-defense, and argued facts outside the record. To the extent we may find these arguments forfeited, as he raised only the *Doyle* issue below, he contends his trial counsel rendered ineffective assistance. We address defendant's arguments in turn.

A. *Doyle* Error

Doyle holds that it is a violation of due process for a prosecutor to impeach a testifying defendant with evidence that he or she remained silent after being arrested and advised of his or her right to remain silent. (*Doyle*, *supra*, 426 U.S. at pp. 618-619.) It has been cabined to post-*Miranda*[13] silence: "the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, [citation], or after arrest if no *Miranda* warnings are given." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 628.)

Defendant argues that the prosecutor committed *Doyle* error twice while cross-examining him and once during closing argument. During cross-examination, the following exchange occurred:

"Q When you were arrested on March 7th, you briefly spoke to police officers, right?

"A Yes.

"Q Very briefly, right?

"A Yes.

"Q What you told them is not what you told us here today?"

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[12]*Doyle v. Ohio, supra,* 426 U.S. 610.

[13]*Miranda v. Arizona, supra,* 384 U.S. 436.

At that point, defense counsel objected. At sidebar, the prosecutor stated that after defendant invoked his right to remain silent, he told detectives, unprompted, "It wasn't me. I'm not about that life." The court ruled that the statement was proper impeachment and overruled defendant's *Doyle* objection. The prosecutor and defendant then had the following exchange:

"Q By [the prosecutor]: Mr. Smith, you did not tell detectives what you are telling this jury, right?

"A No.

"Q You told the detectives, It isn't me, I'm not about that life. And you told them you are in school and stuff, right?

"A I don't remember telling them. I know I told them I didn't want to incriminate myself. I want a lawyer.

"Q You also told them, It's not me. I'm not about that life, right?

"A Probably. I probably did. I don't remember, though."

This was not *Doyle* error. The prosecutor impeached defendant with a statement he made, not his silence. "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." (*Anderson v. Charles* (1980) 447 U.S. 404, 408.)

The court sustained defendant's *Doyle* objection to the other cross-examination exchange he identifies, thus preempting the occurrence of any *Doyle* error. "[A] *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial, and an objection and an appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose." (*People v.*

Clark (2011) 52 Cal.4th 856, 959.) Here, it is clear from the exchange that the court did not allow the prosecutor to use defendant's silence as evidence against him:

"Q You didn't ever tell them that someone pulled a gun on James?

"A No, I didn't.

"Q You didn't ever tell them –

"[Defense counsel]: Objection. This is Doyle error.

"The Court: I will sustain that objection."

The final alleged *Doyle* error to which defendant points occurred during rebuttal. While arguing to the jury that Lane did not have a gun, the prosecutor stated: "Look at this video as many times as you want. And whether it is the first time, the third time, the tenth time, the 20th time, the one thing that is never going to change is that there is no gun anywhere near Chris Lane's body. None. None. [¶] Like I said, Chris was right handed. Why would he be shooting with his left hand? [¶] If Chris Lane had a gun, why didn't [Allen] mention it? She was forthcoming with everything else. Why didn't she mention it? [¶] Why didn't the defendant mention it to Asia [Otts]? Why is the only thing he said is, I am laying low because some shit happened? Why didn't he say someone pulled a gun on James? Why didn't he say that to his mom. [¶] If Chris Lane had a gun, why didn't he say that to the police instead of saying, 'It's not me'?" Defendant objected on *Doyle* grounds, and the court overruled the objection. The court also denied defendant's subsequent request for a mistrial based on *Doyle*.

The court did not err in overruling defendant's final *Doyle* objection. The prosecutor was referring to defendant's affirmative statement, not his silence, and was contrasting it

with his testimony on the stand. (See *People v. Collins* (2010) 49 Cal.4th 175, 203-204.) Because none of the three incidents to which defendant points constituted *Doyle* error, the court was well within its discretion to deny defendant's motion for mistrial on that basis.

B. Misstatement of the Law

Defendant contends the prosecutor committed misconduct by misstating the law of self-defense during closing argument. The prosecutor told the jury, "[Y]ou cannot bring a gun to a fistfight. This is another one of the instructions that you get, 5.31. And it clearly says, when there is an assault with fists, [you] can't bring a deadly weapon. [¶] And the reason that law is in place is exactly for situations like ours, where gangsters are trying to turn murder into self-defense." Defendant did not object at the time. He now argues, however, that the prosecutor "grossly misstated the law of self-defense, misleading the jury into believing that the law categorically prohibited [defendant] from even bringing a firearm, let alone using a firearm, in response to an assault with fists."

"[I]n order to preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection to the alleged misconduct and request the jury be admonished to disregard it." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1339.) Defendant failed to do so and accordingly has forfeited this claim of misconduct on appeal.

Even if he had objected, however, we would not conclude that any error occurred. The prosecutor referred the jury to CALJIC No. 5.31, with which the court instructed the jury, and which provides, "An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense

unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him." The prosecutor's simplification of the concept explained by CALJIC No. 5.31 was not error. It tracked with the instruction and her argument that Lane did not have a gun and therefore defendant was unjustified in shooting him.

C. Facts Outside Record

Defendant's final claim of prosecutorial misconduct is that the prosecutor twice referred to facts outside the record during rebuttal. First, while refuting the defense argument that the crime was not gang-related, the prosecutor asked the jury, as part of a series of rhetorical questions beginning "If it is not gang related," "why was someone in court trying to intimidate M[.] Allen?" Defendant did not object at the time but now argues that this statement "invited the jury to speculate that [defendant] was behind the spectator's conduct." This contention is forfeited. Even if it were not, we find no error. Although it is misconduct for a prosecutor to refer to matters outside the record (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026), a prosecutor is permitted to make fair comment on the evidence, including reasonable inferences or deductions. (*People v. Bonilla* (2007) 41 Cal.4th 313, 337.) A prosecutor is given even wider latitude during rebuttal if his or her arguments fall within the proper limits of rebuttal to arguments of defense counsel. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1026.) Here, the jury heard evidence that defendant was a gang member and that the crimes were gang-related. The jury also heard evidence that trial spectator Williams was affiliated with the same gang as defendant and at least gave the appearance that he was taking a

photo of Allen during trial. It would be reasonable for the jury to infer that Williams acted as he did to command respect for the gang and attempt to frighten victims into not cooperating with law enforcement. The prosecutor's statement was not misconduct.

Defendant also claims the prosecutor improperly referred to matters outside the record when she told the jury during rebuttal, "They want you believe that this car [shown in the post-shooting cell phone video] is somehow involved in getting rid of the gun. First of all, ladies and gentlemen, just because you didn't hear about that car being run or license plate work being done on that car doesn't mean it didn't [*sic*], it means it wasn't presented to you because it wasn't relevant. And you better believe, you better believe that if that car in any way was tied back to Christopher Lane or M[.] Allen or any of their people, you better believe defense would have presented that to you." This argument presumably was made in response to defendant's argument about the video and the car, "We never see that car investigated, by the way, right? You have a license plate. Why doesn't someone tell us what is going on, right? Never see that."

Defendant did not object at the time but now argues that this statement "implied the existence of evidence outside the record that police had eliminated any connection between the car in the video with Lane, Allen, or any of their people, and asked the jury to speculate, based upon such extrinsic evidence, that the car was not involved in disposing of Lane's gun. . . . The prosecutor's argument improperly invited the jury to reject the defense theory by implying the existence of facts outside the record that disproved it." This claim of error is forfeited. Even if it were not, we find no error. The prosecutor's argument rebutted

a defense argument, and "it is neither unusual nor improper to comment on the failure to call logical witnesses." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) Moreover, the jury had the video and could draw its own conclusion about the involvement of the car or the individuals associated with it.

D. Ineffective Assistance of Counsel

Defendant argues that his counsel was ineffective for failing to object to the prosecutor's misstatement of law and references to facts outside the record. We disagree. To demonstrate ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The deficient performance component requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.) Defendant cannot make that showing here because the conduct to which he claims his counsel should have objected was not impermissible.

V. Cumulative Error

Defendant contends that all of the alleged errors discussed above resulted in cumulative error sufficient to deprive him of due process and warrant reversal of his convictions. We disagree. "To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) The cumulative effect of any errors in this case was not prejudicial.

VI. Resentencing Under Section 12022.53, Subdivision (h)

Defendant was sentenced to a term of 25 years to life under

section 12022.53, subdivisions (d) and (e). At the time of his sentencing, the trial court was required to impose that sentence. Senate Bill No. 620, effective January 1, 2018, amended section 12022.53, subdivision (h) to give the trial court, for the first time, the discretion to strike a section 12022.53 enhancement. The amendment applies to all cases, like defendant's, not yet final on appeal when the amendment took effect. (See *People v. Chavez* (2018) 21 Cal.App.5th 971, 1020; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.)

Defendant contends that the amendment is applicable to his case and that we should remand the case for the trial court to exercise its discretion under section 12022.53, subdivision (h). The Attorney General agrees.

We agree with the parties. Remand is required "unless the record shows that the sentencing court clearly indicated that it would not . . . have exercised its discretion to strike the allegations." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) Here, the court explicitly acknowledged that it had no sentencing discretion on either the murder count or the enhancement. It made no comments regarding defendant's behavior or its rationale when imposing the mandatory sentences on the convictions, and likewise offered no insight into its selection of the midterm on the assault count, or its decision to run that sentence concurrently. The record accordingly does not show how the court would have exercised its discretion. Remand is appropriate to allow the trial court the opportunity to exercise its discretion with respect to the firearm enhancement.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under section 12022.53, subdivision (h). The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

MICON, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.